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No. 96-1829

Supreme Court, U. S.

**F I L E D**

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**IN THE SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1996**

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STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY;  
and MARTHA FLETCHER,  
Petitioners,

v.

CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,  
Respondents.

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On Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The Ninth Circuit

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**BRIEF OF AMICI CURIAE STATES OF CALIFORNIA,  
ALASKA, ARIZONA, FLORIDA, HAWAII, IOWA, MAINE,  
MICHIGAN, MINNESOTA, NEVADA, NEW YORK,  
NORTH DAKOTA, SOUTH DAKOTA, UTAH, VERMONT,  
WASHINGTON, AND WYOMING IN SUPPORT OF STATE  
OF MONTANA, ET AL.**

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**INTEREST OF AMICI CURIAE**

By improperly distinguishing *United States v. California*, 507 U.S. 746 (1993) (hereinafter "*California*") the Ninth Circuit creates uncertainty where this Court intended clarity. This uncertainty threatens every State's fisc, regardless of the presence or absence of Indian law questions and regardless of the presence or absence of the federal government or an Indian tribe as a plaintiff. For example, under the Ninth Circuit's reasoning any nontaxpayer who had borne significant economic burden as a result of a state tax could use a federal common law quasi-contract cause of action in an attempt to challenge directly in state court the validity of that state tax (e.g., claim a violation of the Commerce Clause) and, if successful, recover from the state all moneys paid by the actual taxpayer. This reasoning is directly inconsistent with this Court's holding in *California* and could cause serious disruption of the *California* rule and considerable



fiscal damage to the States unless Montana's petition is granted and the Ninth Circuit's decision is reversed.

### ARGUMENT

#### THE NINTH CIRCUIT'S FAILURE TO RESPECT AND FOLLOW THIS COURT'S 1993 HOLDING IN *UNITED STATES v. CALIFORNIA* SHOULD RESULT IN THE GRANTING OF THE PETITION AND THE PER CURIAM REVERSAL OF THE JUDGMENT.

In *United States v. California* 507 U.S. 746 (1993) (cited herein as "*California*"), the federal government sued California to recover taxes which a federal contractor, the taxpayer, had paid to California. Pursuant to contract the federal government had deposited funds into an account from which the taxpayer had paid the California taxes. Operating on the stated assumption that federal courts could entertain a federal common law action for the recovery of state taxes by the federal government (*id.* at 752), this Court held that the federal government had no cause of action against California for money had and received (also known as quasi-contract or *indebitatus assumpsit*). This Court based this holding on its determinations that (1) the federal government's contractual agreement to fund in advance the taxpayer's payments "does not make the Government's payments direct disbursements of federal funds to the State" (*id.* at 753) and (2) *California* was distinguishable from other cases in which, although plaintiff had not paid funds directly to defendant, a theft of plaintiff's funds by plaintiff's agent had resulted in the defendant's possession of the funds under circumstances wherein the defendant should be held responsible for the agent's actions (*id.* at

755-56). In its conclusion, this Court held that the federal government's "shouldering the 'entire economic burden of the levy'" did not give rise to a federal common law cause of action for money had and received. *Id.* at 759.

In the present case, the Ninth Circuit should have applied *California* to deny any relief to the Tribe and to the federal government acting on the Tribe's behalf. If any other remedy still applies to recover taxes when neither statutory remedies nor the principles of subrogation apply, that remedy is an action of assumpsit for money had and received. 507 U.S. at 751, 752. In *California*, where the federal government clearly had assumed the economic burden of the state taxes imposed on the contractor/taxpayer, this Court determined that no contract would be implied in law, and thus no cause of action for money had and received could lie, when a nontaxpayer plaintiff had neither directly disbursed funds to the state nor had its funds stolen and turned over to a defendant who could be held responsible for the theft. *Id.* at 753-56. Neither of these circumstances are present in the present case. In *California* this Court gave no indication that relief from its clear holding could be accomplished through the consideration of other "equitable considerations." See Petition Appendix (hereinafter "Pet. App.") 12.<sup>1</sup>

The Ninth Circuit's holding in the present case cannot be squared with this Court's holding in *California*. The

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1. The Ninth Circuit labels quasi-contract (money had and received) cases like *California* as cases purely in equity. See Pet. App. 8-9 n. 2. In actuality, they are cases which are legal in form but with equitable elements applicable to "very specific factual patterns." Dan B. Dobbs, *Handbook on the Law of Remedies* 236 (1973); see *California*, 507 U.S. at 756, 759 (money had and received cause of action is a "common law cause of action" which necessarily involves a contract implied "in law").

Court of Appeals' conclusion is based upon the assumption (with no proof as to amounts) that the Crow Tribe suffered an economic burden due to Montana's imposition of its taxes upon the mining company that had contracted for rights to mine tribal coal. This "economic burden" basis is derived from the Ninth Circuit's earlier holding that Montana's tax was preempted by federal law because it "had at least some negative impact on the coal's marketability" (Pet. App. 100; emphasis added). See Pet. App. 8 (*Crow Tribe IV*), citing to 969 F.2d at 848-49 (Pet. App. 59-60) (*Crow Tribe III*) and to 819 F.2d at 899 (Pet. App. 97) (part of *Crow Tribe II*'s preemption analysis). The Ninth Circuit's reasoning directly conflicts with *California*, where, despite the fact that the federal government bore the *entire* economic burden by funding its contractor's taxes in advance, this Court held that no money had and received cause of action existed. See 507 U.S. at 759.<sup>2</sup>

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2. *United States v. Jefferson Electric Co.*, 291 U.S. 386, 402-03 (1934), not cited below, is unhelpful to the Tribe and the United States. There, this Court sustained against a due process challenge a federal revenue statute that retroactively imposed on a taxpayer the obligation to establish, as a condition of recovery, that the taxpayer had borne the tax's burden or, if the burden was passed on to purchasers, that the taxpayer had either repaid the purchasers or agreed through posting a surety bond to reimburse the purchasers. In the present case the taxpayer was to pass the burden of the taxes onto its utility customers, not the Tribe (Pet. App. 30 (FOF 44)), and nothing precluded the taxpayer from seeking recovery of Montana's coal taxes. In any event, in *Jefferson Electric* this Court did not provide any third party with an independent cause of action against the government; it merely upheld against a constitutional challenge a statute which permitted the interests of tax-reimbursement-paying purchasers to be protected in the taxpayer's action for money had and received. See also *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46-47 (1990).

Faced with this inconsistency, the Ninth Circuit attempted to distinguish *California* on two invalid grounds: (1) in *California* the state had not fit within the third party thief exception to the direct disbursement rule and the courts had not determined that state itself had illegally collected taxes, while in this litigation Montana itself had already been established as a wrongdoer through its imposition of a preempted tax (Pet. App. 8-9 n. 2); (2) the facts were different in *California*, where the federal government "had voluntarily agreed to reimburse a contractor subject to state tax." Pet. App. 16 (emphasis in original).

The Ninth Circuit's first basis for distinguishing *California* makes no sense. The basic claim in *California*, as it was below, was that the State had illegally collected a tax. The fact that in this case the illegality had been established in an earlier opinion, while in *California* the lack of the federal cause of action prevented the courts from ever deciding the issue of whether the tax had been illegally collected, should make no difference. The effect of the holding in *California* is that, even were it assumed that California's tax collection had been illegal, the federal government as plaintiff could state no cause of action for money had and received against the State of California.<sup>3</sup>

The Ninth Circuit's second basis for distinguishing *California* fares no better than the first. Under *California*, and absent the exceptional facts involving the wrongdoing

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3. Although properly not relied upon by the Ninth Circuit to distinguish the cases, another difference existed between the facts here and the facts in *California*: in *California* the tax was being challenged on state law grounds rather than federal law grounds. This difference is not material, for this Court has recognized that procedural requirements which protect a state tax from attack are not rendered ineffective by basing such an attack on federal constitutional grounds. See *McKesson Corp.*, 496 U.S. at 25 n. 4.



of a third party such as in *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), a direct disbursement of funds from plaintiff to defendant is essential to the existence of a money had and received cause of action—a requirement the Court of Appeals perfunctorily noted but then dismissed without further substantive analysis. Pet. App. at 8-9. In *California*, the federal government had the next best thing, the clear and full economic burden of the government's having funded its contractor's tax payments through advance funding. Under this Court's holding in *California*, the next best thing to direct taxpayer payments was not good enough to give rise to a money had and received cause of action.

Here, the Ninth Circuit has predicated its holding that a money had and received cause of action existed against Montana on the basis of some indefinite, non-"negligible" injury (Pet. App. 100) suffered by the Crow Tribe in the form of lost coal marketability—a loss which says nothing about the appropriateness of implying a quasi-contractual obligation on Montana's part to refund to the Tribe taxes paid by Westmoreland Resources. In practical effect, therefore, the Court of Appeals' ruling has created under the guise of an action in *indebitatus assumpsit* a type of liquidated damages whose amount is measured by the taxes paid to Montana and Big Horn County. That holding, remarkable and unprecedented on its own terms, is directly contrary to the outcome in *California*, where the economic burden upon the unsuccessful nontaxpayer plaintiff was both undisputed and clearly ascertainable.

Finally, the Ninth Circuit's ruling will spawn litigation by nontaxpayers to recover taxes, which even the particular taxpayer is foreclosed from seeking, on the basis that the tax was invalid and caused injury on the complainant by virtue of its imposition on the actual taxpayer. Leaving the Court of Appeals' decision in place

would mean that States will never really know the bounds of their potential liability for tax refunds, since third parties may exist in the background with potential grievances that are unconstrained by the statutory requirements applicable to taxpayer actions. Such a result is plainly incompatible with this Court's unwavering recognition, in preserving the federal balance, of "[t]he States' interest in the integrity of their own [tax refund] processes" (*Arkansas v. Farr's Credit Servs.*, No. 95-1918, \_\_\_ U.S. \_\_\_, 65 U.S.L.W. 4414, 4416 (June 2, 1997), and with the need for clear, certain rules governing recovery of monies that have been paid and thereafter devoted to carrying out governmental functions.

### CONCLUSION

Under the "economic burden" theory adopted by the Ninth Circuit in the present case, the federal government would have prevailed in *United States v. California*. It did not. *United States v. California*, which cannot validly be distinguished from the present case, is binding here. Montana's petition for certiorari should be granted in order to avoid the generation of confusion and fiscal injury in an area in which this Court in *United States v. California* meant to settle the law. Because the Ninth Circuit's decision is directly inconsistent with recent precedent of this Court, it would be entirely appropriate, without further briefing on the merits, to grant Montana's petition, summarily reverse the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with *California* and this Court's per curiam direction. See

*Bibles v. Oregon Natural Desert Ass'n*, \_\_ U.S. \_\_, 117 S.  
Ct. 795 (1997) (per curiam).

Dated: July 9, 1997.

Respectfully submitted,

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